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No.

In The

Supreme Court of the United States

October Term, 1993

MARK H. FOGEL, JEM MANAGEMENT ASSOCIATES CORP., FREDERICK M. MINTZ and JUDITH REAUME,

Petitioners,

vs.

ALLEN KOPELSON, HERBERT H. LEVESS and ALEX ZUPNICK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit erred in certifying the document approving the settlement as a "Final Order" pursuant to the Federal Rules of Civil Procedure 54(b).

2. Whether the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit erred by failing to "spell out" its rationale for approving the settlement.

3. Whether the Petitioners' Fifth and Fourteenth Amendment rights under due process of law have been violated pursuant to such a settlement agreement.

PARTIES TO THE PROCEEDING

The parties in the Court of Appeals for the Second Circuit are those listed in the caption, together with the following additional parties:

Lewis Helphand & Co., Limited Partnership III, *Defendant*

Thompson Parking Partners, *Defendant*

Stanley Muss, *Defendant and Cross-Defendant*

Jack Fogel, *Defendant*

B.S.D. Parking Consultants, Inc., *Defendant*

Martin Prew, *Defendant*

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OPINIONS BELOW

An Order denying Defendants-Appellants' Petition for Rehearing in the United States Court of Appeals for the Second Circuit was entered on April 23, 1993 without opinion and judgment, thereby affirming the earlier opinion of the United States Court of Appeals for the Second Circuit and Final Orders of the Honorable John S. Martin, United States District Judge for the

Southern District of New York. A copy of said Order appears in Appendix A herein.

The United States Court of Appeals for the Second Circuit rendered an Opinion on March 22, 1993 dismissing two related appeals involving the partial settlement of two actions brought on behalf of investors in limited partnerships that were formed to acquire leaseholds in, and operate, two parking garages in New York City, to wit: *Alex Zupnick v. Mark H. Fogel,* 89 Civ. 6607 (S.D.N.Y. filed Oct. 5, 1989) ("*Zupnick*") and *Sperber Adams Assocs. v. JEM Management Assocs. Corp.,* 90 Civ. 7405 (S.D.N.Y. filed Nov. 19, 1990) ("*Sperber Adams*") and a copy of said Opinion appears in Appendix B herein. Some of the nonsettling defendants in both Zupnick and Sperber Adams appealed the final orders of the same court entered on the same day.

The two final orders approved the settlement of the respective plaintiff class' claims against Stanley Muss, a defendant in both actions. The Court of Appeals addressed both appeals together due to their factual similarity, there were duplicative claims raised in both, and because the settlement agreements at issue are interdependent.

The nonsettling defendants claim that the settlement violates their Fifth Amendment rights because it disposes of their property interest in the 79th Street Garage, however, the Court of Appeals held that the nonsettling defendants do not have standing to appeal either of the orders.

A Final Order of the United States District Court for the Southern District of New York, Martin, J., was entered on July 9, 1992. A copy of said Order appears in Appendix C herein. The District Court for the Southern District of New York found the proposed settlements set forth in the hearing to be "in all respects fair, just, reasonable, adequate and in the best interests of the Class, and each of the members of the Class." The Agreement provided

for the settlement of the action on behalf of the named plaintiffs and the members of the Class, on the one hand, and the Settling Defendant, on the other. The Agreement would not take effect without the satisfaction or waiver of certain conditions and the entry and finality of the Final Order.

STATEMENT OF JURISDICTION

1. The decision sought to be reviewed herein was entered on March 22, 1993.

2. Defendant-Appellants' Petition For Rehearing was denied without opinion and judgment and was entered on April 23, 1993.

3. Jurisdiction to review the judgment by Petition For Writ of Certiorari is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in the case are the following:

U.S. Const. Amend. 5, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

> nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 14, § 1, which provides in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Preliminary Statement

This is a petition by the Defendants-Appellants, JEM Management Associates Corp., Mark H. Fogel, Frederick M. Mintz and Mintz & Fraade, P.C. (hereinafter collectively referred to as "Petitioners") from a judgment of the United States Court of Appeals for the Second Circuit affirming the earlier opinion and final orders of the Honorable John S. Martin, United States District Judge for the Southern District of New York, entered on July 9, 1992 in two related actions brought on behalf of investors where the defendants are appellants in both appeals.[1] Judge Martin found

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1. Defendants, Mark H. Fogel, Judith Reaume, Frederick M. Mintz and JEM Management Associates Corp. are Appellants in the two related appeals involving a partial settlement, *Alex Zupnick v. Mark H. Fogel*, 89 Civ. 6607 (S.D.N.Y. filed Oct. 5, 1989) ("*Zupnick*") and *Sperber Adams Assocs. v. JEM Management Assocs. Corp.*, 90 Civ. 7405 (S.D.N.Y. filed Nov. 19, 1990) ("*Sperber Adams*"), having duplicative claims raised in both.

the proposed settlements of the respective plaintiff class claims to be in all respects fair, just, reasonable, adequate and in the best interests of the class, and each of the members of the class.

The Court of Appeals rendered an opinion dated March 22, 1993 dismissing both appeals holding that the nonsettling defendants do not have standing to appeal either of the District Court's orders. The Court of Appeals addressed both appeals together due to their factual similarity and because the settlement agreements at issue are interdependent. The Defendants' Petition For Rehearing was denied on April 23, 1993.

Petitioners file this Petition For a Writ of Certiorari based upon the fact that Petitioners clearly have standing to dispute the agreement and approval of a partial settlement reached between the Plaintiff Class-Appellees (hereinafter "Plaintiff Class" or "Respondents") and Defendant, Stanley Muss (hereinafter "Muss"), in view of the fact that the enforcement of said partial settlement will clearly divest the Petitioners' property interest in the 79th Street Garage.

The Court of Appeals for the Second Circuit denied standing based upon misinformation concerning the value of the 79th Street Garage and Petitioners' leasehold interest in it. The truth of the matter is that neither the value of said garage nor the Petitioners' leasehold interest were issues that were resolved at a proper hearing. Therefore, if the Second Circuit Court of Appeals relied upon the value of the 79th Street Garage to determine that the Petitioners have no standing with respect to the partial settlement, then the Petitioners were denied their due process. Since the Petitioners were denied an opportunity at a hearing or a jury trial, the Petitioners are entitled to such a proper hearing to present the evidence in order to ascertain and access the fair and accurate market value of the 79th Street Garage property.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The United States Court of Appeals, Second Circuit had jurisdiction over this action, an appeal from a judgment certified "final" in accordance with the Federal Rule of Civil Procedure 54(b), pursuant to 28 U.S.C. § 1292(b).

II. Statement of Facts

A limited partnership known as Thompson Parking Partners, Limited Partnership III was a limited partnership of which a corporate entity, JEM Management Associates Corp., and the individual defendant, Mark H. Fogel, are general partners. In addition to Mr. Fogel, Frederick M. Mintz and Judith Reaume are stockholders and directors of such partnership. Mr. Fogel and Ms. Reaume are also officers of the partnership. Defendant law firm, Mintz & Fraade, P.C., provided legal services with respect to the limited partnership offering.

In this case, a class comprised of the purchasers of limited partnership interests in the partnership which purchased a leasehold interest in a Greenwich Village New York City parking garage have brought an action against the general partners, other parties involved in the transaction and the attorneys involved in the syndication, claiming violations of federal securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Muss, the settling defendant, had sold the leasehold interest in the garage to the partnership and, as asserted in the Petitioners' counterclaims which are still to be litigated, made misrepresentations upon which this class action suit is predicated.

Defendant, Muss, entered into a settlement agreement in this action whereupon he is to pay the plaintiff class a total of $850,000.00, together with the *Sperber* settlement, and in exchange, the 79th Street Garage property, in which the

partnership has a leasehold interest, will be returned to him. The plaintiff class' counsel, pursuant to the settlement agreement approved by the court, will obtain a distribution of legal fees, for the 79th Street Garage matters totalling $100,000.00 payable to Zicklin & Laventhol, $60,000.00 in expenses payable to Zicklin & Laventhol and $2,156.00 in fees payable to Bodian & Eames. The individual class members will obtain a distribution of their share of $327,844.00. The partnership, by the settling plaintiff class' action will be divested of its ownership of the garage property.

The plaintiff class, through their counsel, submitted the "Final Judgment" entered in this action which was approved by the District Court. The "Final Judgment", as will be demonstrated in the following arguments, fails to set forth any rationale for having approved the settlement. Further, the "Final Judgment" contains the recitation of Rule 54(b) of the Federal Rules of Civil Procedure certification of finality which is also unsupported by a rationale, and instead was written into the "Final Judgment" so that the distribution of the proceeds of the settlement could be made.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN CERTIFYING THE JUDGMENT AS FINAL UNDER F.R.C.P. 54(b)

The Stipulation of Settlement provides that the settlement shall be deemed null and void in the event that the District Court refused to "approve this Stipulation or any material part of it, or refuses to enter the Final Order, or any material part of it, or if the Final Order is entered and appealed from and an appellate court materially modifies the Final Order or the terms of the Stipulation, the Stipulation shall be null and void . . .".

Said Stipulation is contingent upon the District Court entering a Final Order. The Final Order contained a Fed. R. Civ. P. 54(b) certification.

In the event of partial settlements the practice is that the settlement proceeds be placed in an escrow account pending the resolution of the entire litigation. *See, e.g., In re Worthington Public Power Securities Litigation*, 720 F. Supp. 1379 (E.D. Pa. 1989). In the *Worthington* case, several partial settlements were made prior to the entire matter being resolved and, while the case continued to pend, the proceeds were not distributed but were held pending the resolution of all the issues in the case. This resolution was eventually accomplished and the *Worthington* court, in a comprehensive and detailed opinion, approved the various partial settlements and the resolution of the entire case. It was upon this resolution of the case that distributions were made to the plaintiffs and their counsel.

In the instant action, the entire settlement hinges upon the District Court entering a "final order". "Finality" establishes two (2) goals of the settling parties, to wit: it permits the distribution of the settlement fund, *i.e.*, the award of legal fees and the distribution to the plaintiff class members. These determinations, unless overturned on appeal, would be final in terms of the litigation and not subject to revision by the District Court.

The relevant portion of Rule 54(b) is as follows:

> . . . the court may direct the entry of a final judgment only upon an express determination as to one or more but fewer than all the claims or parties but only on an express determination that there is no just reason for delay and upon an express direction for entry of judgment . . . In the absence of such determination . . . the

> order or other form of decision is subject to revision at any time before [entry of judgment].

Federal Rules of Civil Procedure.

Clearly from the Stipulation of Settlement itself, the settling parties' agreement is specifically contingent upon "finality" as there can be no later revision of the agreement and both parties would be totally and indefeasibly vested in their respective settlement proceeds. In essence, Muss would effectively repurchase the 79th Street leasehold in return for the money paid in both settlements, which are intricately linked. The Petitioners would be permanently divested of their interest in the 79th Street property, the Respondents would get a share of the funds and the attorneys would be paid fees and recovery expenses. Thereafter, litigation would continue against the remaining defendants in both *Sperber* and *Zupnick*.

It is unusual for appealing parties to purport that the court to which they have taken an appeal lacks jurisdiction to hear the subject matter of their appeal. Such claims concerning lack of jurisdiction are usually fielded by appellees who wish to void or delay an appeal. In the instant action, the Petitioners, however, did not seek to have this paper certified as "final" under Rule 54(b). The Petitioners further believe that the District Court erred in certifying this settlement as being final under the standard applicable to the issuance of Rule 54(b) certifications by the district courts.

"The grant of Rule 54(b) certification is reviewable on appeal under an abuse of discretion standard. If the district court abused its discretion in issuing the certification, [the Court of Appeals lacks] jurisdiction over this appeal." *Pension Guaranty Corporation v. The LTV Corporation*, 875 F.2d 1008, 1013 (2d Cir. 1989) (citations omitted). Further, in issuing a Rule 54(b)

certification, a district court cannot merely announce that "there is no just reason for delay. Rather, its certification *must* be accompanied by a reason, even if a brief explanation of its conclusion." *Pension Guaranty, supra* at 1014 (citations omitted; emphasis added).

The District Court must articulate some explanation if the Rule 54(b) certification is to be upheld. "Mere recitation of the language of the rule that 'there is no just reason for delay' is insufficient." *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 419 (2d Cir. 1989); *see also, Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987).

The Rule 54(b) certification granted by Judge Martin is completely insufficient and its basis is clearly unexplained. The certification of the "Final Order" contained in the last paragraph is as follows:

> There being no just reason to delay the entry of this Final Order, this Court hereby directs entry of this Final Order as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

The foregoing is a "mere recitation" of the language of Rule 54(b) and such has been held to be insufficient in *Pension Guaranty, Hudson River Sloop* and *Cullen v. Margiotta, supra.* Said failure is not a mere technical noncompliance and does not present the Court with a close case as to whether to exercise its jurisdiction and hear this appeal. The District Court's decision in granting Rule 54(b) should be reviewed under the standard of whether certification is in "the interest of sound judicial administration." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980); *also see, Perez v. Ortiz*, 849 F.2d 793, 796 (2d Cir. 1988).

As the Fifth Circuit has held, "[a]s a general rule, only final orders of the district court are appealable and unless an order fully disposes of all issues in a case, it is not usually final. This rule expresses a policy against piecemeal appeals that is embodied in the final judgment rule codified at 28 U.S.C. § 1291." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 235 (5th Cir. 1980) (citation omitted). Open issues, such as the Petitioners' rights in the 79th Street Garage property and a factual determination of the propriety of the settlement rob the matter of finality. However, the order is characterized "and there may be no intrusion on appeal." *Id.* (citations omitted).

The "Final Order" entered by the District Court does not provide any explanation or rationale as to why this order should be subject to Rule 54(b) certification. The *Hudson River Sloop* Court found that the Rule 54(b) certification in that case was supported by the unique issues presented and the importance to the public of their being resolved, as set out by Judge Sifton in his explanation of his granting the certification. *See Hudson River Sloop Clearwater, supra*, at 418-419.

The Rule 54(b) certification in this case was proposed by the settling parties and it benefits only the settling parties and their private and parochial requirements that their settlement, which does not dispose of all the claims involving Muss, should be deemed to be final at this point. In the instant action the District Court does not provide such a rationale and none appears on its face.

It is respectfully submitted that there is no reason why review should be held at this stage of the litigation nor why this settlement should be deemed "final" by the District Court. It is further submitted that since the Rule 54(b) certification was improvidently granted, then it is defective as it fails to embellish in an explanation or rationale that the court lacks jurisdiction over this case.

The "Final Order" appealed from is not final by any means and should not be considered final. Accordingly, the Rule 54(b) certification should be held to be improvidently granted and the case remanded for re-entry of the order without a Rule 54(b) certification.

II.

THE DISTRICT COURT ERRED IN APPROVING THE SETTLEMENT.

The District Court, pursuant to Federal Rule of Civil Procedure 23(e), is required to approve the settlement or compromise the class actions suits, such as the instant case.

This Court, in the recent *Boesky* litigation affirmed the District Court's (Pollack, J.) approval of a settlement, noting that the District Court had made findings relative to fairness, adequacy and reasonableness of the settlements. The Court of Appeals for the Second Circuit found that there was a duty to make such an evaluation. *In re Boesky Securities Litigation*, 948 F.2d 1358, 1367, 1368 (2d Cir. 1991). The Court of Appeals for the Second Circuit has held that the approval of a settlement should be upheld upon review when such approval is based upon well-reasoned conclusions arrived upon after due consideration. *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). The *Boesky* court held that the approval of a settlement under Rule 23(e) is reviewable under an abuse of discretion standard. The *Boesky* court cited and approved the Fifth Circuit's holding in *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228 (5th Cir. 1980).

The Fifth Circuit cogently points out that Rule 23(e) although requiring judicial approval of any class action settlement, fails to "provide any standards for such approval." *In re Chicken Antitrust*

Litigation American Poultry, supra, 669 F.2d at 237. The court further states that "it is now clear, however, that to approve a settlement, the district court must find that it 'is fair, adequate and reasonable and is not the product of collusion between the parties.' " *Id.* at 237 (citation omitted). "Determining the fairness of the settlement is left to the sound discretion of the trial court and we will not overturn that court's decision absent a clear showing of abuse of that discretion." *Id.* (citation omitted).

The "Final Order" of the District Court is devoid of any explanation of its rationale for approving the settlement and does not make any of the findings the district courts must make.

There is no basis to even attempt an evaluation of the factors nor is there any factual description specifically describing the transactions examined in reaching the conclusion that the proposed transactions are "fair, just, reasonable, adequate and in the best interest of the class." At a hearing held on the entry of the "Final Order", the District Court did not go into any of the factors necessary for the mandated evaluation.

Pursuant to the "Final Order" in this action, there is no basis to make an evaluation of the District Court's application of its discretion because the basis for exercising that discretion is not enumerated by the District Court anywhere in said order. The District Court is required to make and spell out its determination "under a 'universally applied standard' to detemine whether the settlement is 'fundamentally fair, adequate and reasonable.' " *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1441 (9th Cir. 1989).

Based upon the document itself, it is not possible to determine whether this settlement is fair, adequate and reasonable and is not the product of collusion between the parties. For the foregoing reasons, approval is an abuse of discretion and the "Final Order"

should be vacated and the case remanded back to the District Court with instructions that it make the required findings.

III.

THE COURT OF APPEALS RELIED UPON INACCURATE AND INCOMPLETE INFORMATION TO CONCLUDE THAT PETITIONERS LACKED STANDING TO BRING THE APPEAL.

The Court of Appeals for the Second Circuit concluded that the Petitioners lacked standing to bring an appeal because the Petitioners are non-settling defendants who will not suffer any legal prejudice as a result of the proposed partial settlement between the plaintiff class and Muss. The Second Circuit further held that the Petitioners will not suffer any legal prejudice.

The Court of Appeals improperly concluded that the 79th Street Garage property, which would be taken from the Petitioners and returned to Muss pursuant to the proposed partial settlement, has no value, so that the Petitioners were "not giving up anything of value by returning it to Muss." Opinion dated March 22, 1993 at 18a.

These conclusions are based upon findings which are completely incorrect and which were accepted by the Second Circuit Court of Appeals without the necessary accurate supporting information. It will be demonstrated below that the Petitioners were not given the opportunity to present any evidence, nor was any proper hearing held.

Courts permit a non-settling defendant to object to a court order approving a partial settlement where the "remaining party can demonstrate "plain legal prejudice." *Quad/Graphics, Inc. v. Sass*, 724 F.2d 1230, 1233 (7th Cir. 1983). The Petitioners were

denied the opportunity to demonstrate that they would suffer plain legal prejudice. Moreover, "[t]his standard should strike the proper balance between the policy consideration of encouraging voluntary resolutions of litigation and the *court's duty to protect the rights of the parties before it.*" *Id.* (emphasis added). The Second Circuit Court of Appeals should have exercised its duty to protect the rights of the Petitioners by granting them a hearing to demonstrate the plain legal prejudice they will suffer if the proposed partial settlement is approved.

A. Petitioners Were Denied the Opportunity to Present Evidence on the Issue of the Value of the 79th Street Garage.

Preclusion of the Petitioners from bringing an appeal for lack of standing based upon factual conclusions where Petitioners were denied the opportunity to present evidence or refute is absolutely unfair and unjust and deprives Petitioners of their due process under the law. Petitioners clearly had no opportunity to present evidence concerning the value of the 79th Street Garage.

The District Court hearing focused on the substantive merits of the proposed partial settlement, rather than upon the standing of Petitioners to contest the proposed partial settlement and made broad conclusions without holding a proper hearing for such purpose. Therefore, the Court of Appeals for the Second Circuit was deprived of the opportunity to hear the merits of said appeal. Upon the lack of evidence and inaccurate information the Court of Appeals decidedly dismissed the appeal for lack of standing.

Muss insisted the 79th Street Garage be returned to him as a prerequisite to any settlement. If Muss, as part of the settlement agreement, desired that the 79th Street Garage property be returned to him, it clearly must have *some* monetary value. The plaintiff class improperly benefited in utilizing an asset owned partially by the non-settling Petitioners by using it as a bargaining tool for their settlement with Muss.

There were statements contained in a report made by the Receiver which indicated that the 79th Street Garage was not a viable entity, therefore, the partnership would not be turning over a valuable asset by returning the leasehold interest to Muss. However, said report did not relate to the contested issue which required any response from the Petitioners. Since the issue of the value of the 79th Street Garage property was relied upon by the Second Circuit Court of Appeals, the Petitioners are entitled to a proper hearing relating to the issue of its market value, or at least the opportunity to submit evidence which contradicts the report of the Receiver.

At this time the Petitioners have a leasehold interest in the 79th Street Garage property. The 79th Street Garage is an active business with numerous monthly garage tenants. As a result, it is continuously receiving revenues from these tenants. Clearly, an ongoing business with a steady flow of income and accounts receivable has value.

Hence, in the event that the 79th Street Garage is taken from the Petitioners, the Petitioners will certainly be losing an asset which has value. The proposed partial settlement not only deprives the Petitioners of their property rights, but it also fails to provide compensation for their loss.

B. The Report of the Receiver Does Not Lend Adequate Factual Support to the Court of Appeals' Conclusion of Law.

The Court of Appeals for the Second Circuit relied upon the Receiver's report that "the 79th Street Garage was not a viable entity based upon the amount of rent the limited partnership was obligated to pay" and that "the partnership was not giving up anything of value in returning the leasehold interest to Muss." These statements are blatantly untrue and were not previously addressed merely because this issue was not addressed to the Court

of Appeals or before the District Court. In fact, nothing in the Record supports the report of the Receiver. No evidence is offered regarding any appraisals of the 79th Street Garage property by the Receiver nor is any evidence offered in the record indicating the comparison done by the Receiver of the income of the 79th Street Garage versus its obligations.

A factual conclusion that so heavily influences the legal rights of the parties should not be accepted without adequate foundation and an opportunity by the affected parties to challenge the conclusions and present evidence. The failure of the record to provide factual support for the Receiver's conclusions should be noted and balanced against the evidence to be provided by the Petitioners at a future hearing.

C. The Court of Appeals Should Not Enforce the Language of the Lease Agreement Because Muss Fraudulently Induced Petitioners to Enter into Said Lease Agreement.

The 79th Street Garage property should not be taken from the Petitioners without any remuneration and returned to Muss, who the Petitioners allege fraudulently induced them to enter into the lease agreement. The Court of Appeals construes the language, especially paragraph 17, of the lease agreement to improperly explain that the Petitioners do not have a property interest in the 79th Street Garage.

This is premature because presently the lease agreement is in effect and the foreclosure proceeding in the New York state court has been stayed. The Court of Appeals cannot predict with any degree of certainty the result of the New York foreclosure proceeding and cannot second-guess the New York state court judges. Moreover, the Court of Appeals cannot predict what events or cure will occur prior to the resolutions of the stayed New York foreclosure proceeding.

In fact, had the Petitioners discovered that Muss fraudulently induced them to enter into a lease agreement prior to the information obtained during discovery in the District Court actions herein, the Petitioners would have amended their pleadings in the foreclosure proceeding to assert claims of fraud against Muss.

The Second Circuit Court of Appeals should not have dismissed the appeal and should not enforce the lease agreement. Rather, the Court of Appeals should set the lease agreement aside due to Muss' fraudulent conduct which induced the Petitioners to enter into the lease agreement. Alternatively, the Court of Appeals should have modified the 79th Street Parking Garage rent to reflect the appropriate fair market value and to offset the Petitioners' damages caused by Muss' fraud.

In view of the fact that the Petitioners would have presented evidence in the foreclosure proceeding to document how Muss fraudulently induced them to enter into the lease, invalidation of the lease by the New York state court is as likely as its enforcement. Therefore, it was inappropriate and improper for the Second Circuit Court of Appeals to render its decision based upon a prediction of what may occur in the New York foreclosure proceeding.

D. The Proposed Partial Settlement Will Invalidate Petitioners' Contract Rights.

"Authority exists for finding legal prejudice sufficient to confer standing where a settlement invalidates the contract rights of one not participating in the settlement." *Waller v. Financial Corp. of America,* 828 F.2d 579, 583 (9th Cir. 1987). Clearly, transferring the leasehold interest in the 79th Street Garage from the Petitioners to Muss would completely invalidate the Petitioners' contract rights in the 79th Street Garage. Regardless of the Court of Appeals for the Second Circuit's predictions, the

Petitioners have a valid property interest in the 79th Street Garage property, which and their interest cannot presently be denied without due process of law.

Moreover, permitting the transfer of the 79th Street Garage to Muss from the Petitioners would interfere with the 79th Street Limited Partnership Agreement and the Petitioners' respective rights thereafter. The Petitioners are entitled to a jury trial to properly determine their rights. The return of the 79th Street Garage to Muss without an appropriate jury trial would deprive the Petitioners of their due process rights.

E. Petitioners' Fifth and Fourteenth Amendment Rights Are Violated Under the Settlement.

The Petitioners have a property interest, as general partners and shareholders in the limited partnership. Said interest is a leasehold in the 79th Street Garage property which is terminated under the terms of the Stipulation of Settlement such that the leasehold is indefeasibly returned to Muss. The "Final Order" thereby disposes of the property rights of the non-settling parties, the Petitioners, without having allowed them an opportunity to assert their claims or to protect their property interest in said 79th Street Garage leasehold.

The District Court's "Final Order" approved the Stipulation of Settlement, yet does not provide any justification for terminating the Petitioners' interest in the leasehold. The instant action presents a unique set of facts wherein the plaintiff class and a single defendant have negotiated and agreed upon the terms of a settlement, one of which is to dispose of the property interest of the non-settling parties.

The Fifth and Fourteenth Amendments to the United States Constitution protect citizens from the taking of their property

without due process of law. The relevant portion of the Fifth Amendment states that citizens of the United States should not ". . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. 5. Moreover, the relevant portion of the Fourteenth Amendment is as follows: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14, § 1.

The District Court, in approving the settlement agreement, does not consider that under the irrevocable "Final Order" all of the Petitioners' property rights in the leasehold of the 79th Street Garage are extinguished.

Before a parties' interest in property can be extinguished or transferred, the parties are entitled to notice and to a hearing which fairly comports with due process. The United States Supreme Court has discussed the condition under which the courts may dispose of property belonging to one party and claimed by another under some color of right. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1973); *Fuentes v. Shevin*, 407 U.S. 67 (1971); *Snaidaich v. Family Finance Corp.*, 395 U.S. 337 (1969); *see also, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1974).

Central to these cases is the proposition that the party who seeks to acquire or to dispose of the interest of any other party in property must make some showing before a judicial officer of right to have, take, hold or dispose of the property prior to any taking or disposition.

The Respondents purport that the leasehold interest has absolutely no value. However, it obviously has some value to Muss in order for him to demand in the settlement negotiations that the leasehold be returned. Notwithstanding whether the property has value or not, the Petitioners have a property interest in said property under the Fifth and Fourteenth Amendments. In addition,

more specifically, the Fifth Amendment does not address itself to the value of the property, merely to the interest in property.

In the instant action, the District Court, without so much as any explanation or justification, extinguished the Petitioners' interest in the leasehold of the 79th Street Garage. If there was any justification for this, it is not detailed in the "Final Order" allowing the nondescriptive transaction which gives full force and effect to the settlement.

It is respectfully submitted that no proceeding which fairly comports was held with regard to the private deal whereby the plaintiff class, which has no direct ownership interest in the leasehold, and Muss, the seller of the leasehold to the partnership, are found to have reason to be allowed to transfer the property to Muss without any reference to the Petitioners' interest.

For the aforementioned reasons, the instant "Final Order" should be vacated and this action remanded for further proceedings to determine the propriety of extinguishing the Petitioners' interest in the 79th Street Garage leasehold.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition For Writ of Certiorari be granted to remand this action for further proceedings, to grant a hearing to determine whether the 79th Street Garage property has "value", to grant a stay of the judgment sought herein, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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MINTZ & FRAADE, P.C.
Attorneys for Petitioners
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APPPENDIX A — ORDER DENYING PETITION FOR REHEARING DATED APRIL 23, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23th day of April, one thousand nine hundred and ninety-three.

Present: HON. THOMAS J. MESKILL, Chief Judge
HON. J. DANIEL MAHONEY,
HON. JOHN M. WALKER,

Circuit Judges.

Docket No. 92-7870

ALEX ZUPNICK; HERBERT H. LEVESS; ALLEN KOPELSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-v.-

MARK H. FOGEL; JEM MANAGEMENT ASSOCIATES CORP.; FREDERICK M. MINTZ; JUDITH REAUME and MINTZ & FRAADE, P.C.,

Defendants-Appellants,

THOMPSON PARKING PARTNERS; LIMITED PARTNERSHIP III; JACK FOGEL, B.S.D. PARKING CONSULTANTS, INC. and MARTIN PREW,

Defendants,

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STANLEY MUSS,

Defendant-Appellee,

ALEX ZUPNICK; HERBERT H. LEVESS and ALLEN KOPELSON,

Counter-Defendants,

STANLEY MUSS,

Cross-Defendant.

Docket No. 92-7870

JUDITH REAUME; FREDERICK M. MINTZ; JEM MANAGEMENT ASSOCIATES CORP. and MARK H. FOGEL,

Counter-Claimants,

MARK H. FOGEL; JEM MANAGEMENT ASSOCIATES CORP., FREDERICK M. MINTZ and JUDITH REAUME,

Cross-Claimants.

A petition for rehearing having been filed herein by Defendants-Appellants Mark H. Fogel, Jem Management Associates Corp., Frederick M. Mintz and Mintz and Fraade, P.C.

Upon consideration by the panel thereof, it is

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Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 680 August Term, 1992

(Argued December 8, 1992 Decided March 22, 1993)

Docket No. 92-7870

ALEX ZUPNICK; HERBERT H. LEVESS; ALLEN KOPELSON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

MARK H. FOGEL; JEM MANAGEMENT ASSOCIATES CORP.; FREDERICK M. MINTZ; JUDITH REAUME and MINTZ & FRAADE, P.C.,

Defendants-Appellants,

THOMPSON PARKING PARTNERS, LIMITED PARTNERSHIP III; JACK FOGEL, B.S.D. PARKING CONSULTANTS, INC. and MARTIN PREW,

Defendants,

STANLEY MUSS,

Defendant-Appellee,

ALEX ZUPNICK; HERBERT H. LEVESS and ALLEN KOPELSON,

Counter-Defendants,

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STANLEY MUSS,

Cross-Defendant.

JUDITH REAUME; FREDERICK M. MINTZ; JEM MANAGEMENT ASSOCIATES CORP. and MARK H. FOGEL,

Counter-Claimants,

MARK H. FOGEL; JEM MANAGEMENT ASSOCIATES CORP., FREDERICK M. MINTZ and JUDITH REAUME,

Cross-Claimants.

* * * *

No. 688 August Term, 1992

(Argued December 8, 1992 Decided March 22, 1993)

Docket No. 92-7872

SPERBER ADAMS ASSOCIATES; MELVIN R. PLATT; JOAN KAHN; ROBERT W. BROOKS; ANTHONY WIDMAN, as Trustee, Anthony Widman Pension Plan; JOSEPH RADOSITI; HAROLD L. HITCHINS, JR.; DOROTHY W. BOSWELL; JAMES W. ZULLIGER, JR.; STANLEY H. STOLAR; MARK J. KUSHNER; JOSEPH GREENBERG; BARBARA GREENBERG; RUSSELL C. JORDAN; JAMES J. JEFFREYS; FREDERICK D. SEWELL; ROBERT P. GORMLY, SR.; ANTHONY ARANGIO; RAJIV SAXENA; LEE B. TREVINO; ALBERT ROEPER; CHARLES W. FLETCHER; VERNON POTTER, As Trustee for Dallas Wholesale Employees Trust; ROBERT ISRAELOFF; RAJKUMAR MARIWALLA; ROSE

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ARONIN; S. MOHANDOSS; KALA MOHANDOSS; WILLIAM GLAZER; MAX COHEN; MAX BUCHWALD; ROSEMARY BUCHWALD; PHILIP J. SMITH; MARY PAGE YOUNG; SURI PONAMGI; HAROLD LEVINE; JOHN G. SCRANTON; LOUIS RUBINSTEIN; RACHEL RUBINSTEIN; ARVEN ARONIN; GABE LEVENTHAL; LEWIS B. LANE; DAVID S. KIDDER; MICHAEL S. LEY, for Henry C. Kunkel; VINCENT D. CARACIO; WILLIAM M. YAMANAKA; ROSE E. WOLF; RONALD J. ROSS, JR. and DONALD T. COHEN,

Plaintiffs-Appellees,

v.

JEM MANAGEMENT ASSOCIATES CORP., JEM PARKING MANAGEMENT CORP., MARK H. FOGEL; JUDITH REAUME; FREDERICK M. MINTZ; JACK FOGEL; STANLEY MUSS, B.S.D. PARKING CONSULTANTS, INC.,

Cross-Defendants.

GOLDSTEIN, GOLUB, KESSLER & COMPANY, P.C.; JEM MANAGEMENT ASSOCIATES CORP.; JEM PARKING MANAGEMENT CORP.; MARK H. FOGEL; JUDITH REAUME; FREDERICK M. MINTZ,

Cross-Claimants,

JACK FOGEL; STANLEY MUSS; LEWIS HELPLAND & CO.; GOLDSTEIN, GOLUB, KESSLER & COMPANY, P.C.; KESSLER & COMPANY; B.S.D. PARKING CONSULTANTS, INC.; MARTIN PREW,

Defendants,

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STANLEY MUSS,

Defendant-Appellee,

JEM MANAGEMENT ASSOCIATES CORP.; JEM PARKING MANAGEMENT CORP.; MARK H. FOGEL; FREDERICK M. MINTZ,

Defendants-Appellants.

Before: MESKILL, *Chief Judge,* MAHONEY and WALKER, *Circuit Judges.*

Appeals by some of the nonsettling defendants from two final orders of the United States District Court for the Southern District of New York, Martin, J., approving the partial settlement of two class actions between the plaintiff classes and defendant Stanley Muss.

Appeals dismissed for lack of standing.

RONALD COHEN, New York City, *for Appellants.*

ROBERT ZICKLIN, New York City (Elliot L. Evans, Laventhall & Zicklin, New York City, of counsel), *for Appellees Alex Zupnick. Herbert H. Levess and Allen Kopelson.*

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ROBERT I. BODIAN, New York City (Erica Lehrer, Bodian & Eames, New York City, of counsel), *for Appellees Sperber Adams Associates, et al.*

MESKILL, *Chief Judge:*

These two related appeals involve the partial settlement of two actions brought on behalf of investors in limited partnerships that were formed to acquire leaseholds in, and operate, two parking garages in New York City. Some of the nonsettling defendants in *Alex Zupnick v. Mark H. Fogel*, 89 Civ. 6607 (S.D.N.Y. filed Oct. 5, 1989) (*Zupnick*), appeal a final order of the United States District Court for the Southern District of New York, Martin, J., entered on July 9, 1992. Some of the nonsettling defendants in *Sperber Adams Assocs. v. JEM Management Assocs. Corp.*, 90 Civ. 7405 (S.D.N.Y. filed Nov. 19, 1990) (*Sperber Adams*), appeal a final order of the same court entered on the same day.[1] These two orders approved the settlement of the respective plaintiff class' claims against Stanley Muss, a defendant in both actions. The district court found the proposed settlements to be "in all respects fair, just, reasonable, adequate and in the best interests of the Class, and each of the members of the Class." We address both appeals together because of their factual similarity and because the settlement agreements at issue are interdependent.

The appellants in both cases (the nonsettling defendants) argue that the district court erred in certifying the orders at issue as final judgments under Fed. R. Civ. P. 54(b). Making an unusual argument for appellants, they urge us to conclude that, as a result of this improper certification of the orders as final, we lack appellate

jurisdiction to hear these appeals. The nonsettling defendants seek such a holding because it would destroy both the *Zupnick* and the *Sperber Adams* settlements which are contingent on the finality of these orders. They also contend that the district court erred in approving these settlements and in failing to set forth adequately the basis for its approval. The nonsettling defendants in *Sperber Adams* additionally argue that the settlement violates their Fifth Amendment rights because it disposes of their property interest in the 79th Street Garage without according them the opportunity to assert their claims.

The plaintiff-appellee class in *Zupnick* contends that the nonsettling defendants have no standing to appeal the order approving the proposed partial settlement in that case because the order does not affect their rights. Because we hold that the nonsettling defendants do not have standing to appeal either of these orders, we dismiss the appeals.

BACKGROUND

These appeals arise out of the acquisition by a number of investors of interests in two limited partnerships. Thompson Parking Partners, Limited Partnership III (Thompson Limited Partnership) was formed in June 1988 to acquire a leasehold interest in, and to operate, an existing parking garage in Manhattan's Greenwich Village (Thompson Street Garage). JEM Parking Partners, Limited Partnership IV (79th Street Limited Partnership) was formed in September 1988 to acquire a leasehold interest in, and to operate, an existing parking garage in Manhattan's Upper East Side (79th Street Garage). Appellant Mark Fogel and others formed corporate appellant JEM Management Associates Corp. (JEM Management) to syndicate the Thompson Limited Partnership and corporate appellant JEM

Parking Management Corp. (JEM Parking) to syndicate the 79th Street Limited Partnership. JEM Management and JEM Parking are the managing general partners of the respective partnerships. Fogel is the majority stockholder, president and a director of both JEM Management and JEM Parking. He is also the administrative general partner of both limited partnerships. Appellants Judith Reaume and Frederick Mintz are shareholders, directors and, in the case of Reaume, an officer of both JEM Management and JEM Parking. Appellant Mintz & Fraade, P.C. represented the Thompson Limited Partnership in connection with the acquisition of the leasehold interest in the Thompson Street Garage and, according to the amended complaint in *Zupnick*, participated in the preparation and distribution of the offering materials for the Thompson Limited Partnership.

The plaintiffs-appellees claim they were induced to invest in the partnerships based on false and misleading information contained in private placement memoranda and investment summaries (the offering materials) allegedly prepared or disseminated by JEM Management, JEM Parking, Mark Fogel, Reaume, Mintz and others. The *Zupnick* action was filed on October 5, 1989 on behalf of all purchasers of limited partnership units in the Thompson Limited Partnership who had sustained damages. The district court subsequently certified it as a class action. *Zupnick v. Thompson Parking Partners*, No. 89 CIV. 6607, 1990 WL 113197, at *6 (S.D.N.Y. Aug. 1, 1990). The amended complaint alleged, *inter alia*, that the offering materials failed to disclose that, of the $2.25 million purportedly paid to purchase the leasehold interest, $850,000 was to be diverted to, or for the benefit of, the defendants. The amended complaint also alleged that the offering materials failed to disclose that the leasehold interest purchased by the Thompson Limited Partnership was commercially worthless. The *Zupnick* plaintiffs asserted claims of

violations of federal securities law, the Racketeer Influenced and Corrupt Organizations Act (RICO) and state common law.

On November 19, 1990, the *Sperber Adams* action was filed on behalf of all investors who sustained damages as a result of their purchase of limited partnership units in the Thompson or the 79th Street Limited Partnerships. The *Sperber Adams* plaintiffs alleged wrongdoing in connection with the promotion and sale of the limited partnership shares.[2] The amended complaint in this case claimed, *inter alia,* that the offering materials failed to disclose that the leasehold interest on the 79th Street Garage was commercially worthless and that, out of the $1.65 million purportedly paid to purchase it, defendant Stanley Muss, owner of the fee interest in the garage, received only approximately $900,000. The *Sperber Adams* plaintiffs alleged similar causes of action as those asserted in *Zupnick.* In addition to damages, they also sought the appointment of a receiver for both partnerships. In April 1991 the district court complied with this request and appointed Joseph Aronauer, Esq. as Receiver for both the 79th Street and the Thompson Limited Partnerships. The court stated that it found it necessary to do so for the protection of the rights of the limited partners and the creditors of the two limited partnerships.

Almost immediately after the Receiver was appointed, counsel for the appellees and the Receiver learned that the partnerships were several months in arrears on the rent and other payments for both garages and that eviction actions were pending in New York state court brought by the landlords of both garages. The nonsettling defendants offered no defense to these proceedings. In fact, appellant Mark Fogel stated in open court that the partnerships had no funds to cure the defaults.

Following a finding by the Receiver that the Thompson Street

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Garage was not economically viable, the leasehold interest in the Thompson Street Garage was returned to the landlord by agreement of the Receiver, the landlord and the general partners of the Thompson Limited Partnership. Because Muss had been named as a defendant in the *Sperber Adams* case, the district court stayed the summary state court eviction proceeding that Muss had commenced against the 79th Street Limited Partnership because of its failure to pay rent. In May 1991 the court held a hearing in the *Sperber Adams* case on Muss' motions to dismiss the claims lodged against him and to vacate the order to stay the state proceeding. The district court made the following preliminary findings of fact. *See Sperber Adams Assocs. v. JEM Management Assocs. Corp.*, No. 90 Civ. 7405, 1991 WL 156337, at *1-3 (S.D.N.Y. Aug. 5, 1991).

Muss is primarily in the business of purchasing and selling leasehold interests in parking garages. He obtained in late 1985 or early 1986 a fifteen year lease for the Thompson Street Garage in return for his promise to pay an escalating rent which started at $37,000 per month plus taxes and other related expenses. Muss also obtained in 1986 the fee interest in the 79th Street Garage for $1.5 million. Both deals were negotiated by Jack Fogel, Muss' regular broker.

The district court also found that, in 1987, Muss decided to sell leasehold interests in the garages. Jack Fogel spoke to Muss about selling the leasehold interests to a syndicate of investors procured by Mark Fogel, Jack Fogel's son. No other effort was made to market the leasehold interests. Mark Fogel and others formed JEM Parking and JEM Management to syndicate the limited partnerships. Muss sold his leasehold interest in the Thompson Street Garage to the Thompson Limited Partnership and a twenty year leasehold in the 79th Street Garage to which he owned the fee to the 79th Street Limited Partnership.

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At the hearing, the evidence revealed that, of the $2 million Muss received for assigning his fifteen year leasehold interest in the Thompson Street Garage, he retained only approximately $900,000 to $1 million. Taxes consumed only $130,000. What the district court termed "the missing" $850,000, *Sperber Adams Assocs.*, 1991 WL 156337 at *2, was returned by Muss to an alleged entity, B.S.D. Parking Consultants, as a brokerage commission. Neither Muss nor his counsel was able to identify B.S.D.'s principals and the court found that there was "a strong inference" that the Fogels or the general partners received the large brokerage commission. The court noted that even though Muss retained only $1 million at most, the partnership's offering materials told the potential investors that $2 million was being paid for the leasehold interest. Similarly, the court found that, although the 79th Street Limited Partnership's offering materials stated that the purchase price was $1.65 million, Muss received only approximately $950,000 for his sale of a twenty year leasehold interest in that garage. In the case of the 79th Street deal, the brokerage commission apparently was paid directly by the partnership's general partners rather than being funneled through Muss.

The district court found that the 79th Street Limited Partnership's inability to pay the unpaid rent presumably would allow Muss the return of his garage. The limited partners, however, sought to prevent Muss from recovering the leasehold interest in the 79th Street Garage. They argued that Muss' motion to vacate the stay of the state court eviction proceeding should be denied to allow the leasehold to be held by the Receiver to offset any potential judgment the limited partners might achieve against Muss for aiding and abetting the fraud of the nonsettling defendants in soliciting the limited partners as investors.

After hearing the testimony at the hearing, the district court

concluded that the evidence "pretty clearly establishes that a blatant fraud was committed on the investors in these partnerships," and that "Mark Fogel and Jack Fogel, among others, were knowing participants in the scheme," *Sperber Adams Assocs.*, 1991 WL 156337 at *3. The judge also found that "[w]hile Mr. Muss says that he is totally unaware of this, I certainly think a *prima facie* case of his participation in this fraud can be found." The district judge denied Muss' request to vacate the stay of the state eviction proceeding and prevented the return of the 79th Street Garage to Muss. *Sperber Adams Assocs.*, 1991 WL 156337 at *6. The court held that because the plaintiffs had presented a *prima facie* case of Muss' liability, they did not have to pay rent to Muss during the pendency of this action. The judge noted, *inter alia*, that the damages the limited partners sought from Muss far exceeded the unpaid rental. *Id.*

In April 1992, Muss and the plaintiffs submitted to the district court a proposed settlement of the plaintiffs' claims against Muss in both cases. The settlement in *Zupnick* provides that Muss will pay the plaintiff class the sum of $490,000, which is almost one-quarter of the total investment of $2,250,000 made by class members. The *Sperber Adams* settlement provides that Muss will pay $360,000 to the plaintiff class, which is more than twenty percent of the total investment made by class members. As part of the *Sperber Adams* settlement, the 79th Street leasehold will be returned to Muss. From the sum paid by Muss, plaintiffs' attorneys will be paid fees and expenses and litigation will continue against the remaining defendants in both cases. The settlements also provided that a final order was to be entered pursuant to Fed. R. Civ. P. 54(b) to permit the funds to be distributed immediately to the members of the class.

On June 22, 1992, the nonsettling defendants submitted their

objections to the proposed settlements to Judge Martin. They argued that they had a continuing interest in the partnerships and the assets of the partnerships. They objected to the provision in the *Sperber Adams* settlement which called for the relinquishment of the leasehold interest in the 79th Street Garage to Muss, who is the fee owner. The nonsettling defendants also argued that they had interposed two cross-claims against Muss based on his allegedly materially false fraudulent misrepresentations to them with respect to the sale of the garages, and that these were direct claims, not merely claims for contribution. The district court held a hearing on June 26, 1992 concerning the proposed settlements. The Receiver reported to the court that the 79th Street Garage was not a viable entity and therefore the 79th Street Limited Partnership was not giving up anything of value by returning it to Muss. No member of either class objected to the settlements.

On July 9, 1992, the district court entered an order in both the *Zudnick* and *Sperber Adams* cases approving the settlements between the plaintiff-appellee classes and defendant Muss. It is from these orders that some of the nonsettling defendants now appeal.

DISCUSSION

The *Zupnick* plaintiff-appellee class contends that the nonsettling defendants do not have standing to appeal the court order approving the settlement agreement. Because we agree and find this argument dispositive of both appeals, we need not reach the merits of the nonsettling defendants' arguments. Although the plaintiff-appellee class in *Sperber Adams* did not argue in their briefs that the nonsettling defendants lacked standing to bring this appeal, at oral argument, counsel for this class contended that no rights of the nonsettling defendants were affected by the settlement

agreement. In any case, the question of standing is a "threshold determinant[] of the propriety of judicial intervention." *See Warth v. Seldin*, 422 U.S. 490, 518 (1975). Therefore, we consider whether the nonsettling defendants have standing to bring either of the two appeals before us.

Usually, a nonsettling defendant lacks standing to object to a court order approving a partial settlement because a nonsettling defendant is ordinarily not affected by such a settlement. *See, e.g. Waller v. Financial Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983); *In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14 (lst Cir.), *cert. denied sub nom. Arthur Andersen & Co. v. Stewart*, 449 U.S. 826 (1980); *see also* 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.80[5] (2d ed. 1992) ("A codefendant has no standing to appeal from a consent decree that binds him in no way and does not affect his legal rights."). "This rule advances the policy of encouraging the voluntary settlement of lawsuits." *Waller*, 828 F.2d at 583. Because, however, courts also have a duty to protect the rights of the parties before them, there is a recognized exception to this general rule which "permit[s] a non-settling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Id.; see also Quad/Graphics, Inc.*, 724 F.2d at 1233. We conclude that the nonsettling defendants are not entitled to appeal these orders because they have not convinced us that the settlement agreements cause them to suffer any legal prejudice.

The nonsettling defendants basically claim that their rights are affected by the orders in question in three ways. They contend the orders: (1) potentially foreclose them from bringing their cross-claims against Muss, (2) extinguish their property rights in the 79th

Street Garage, and (3) deprive them of the repayment of certain loans to the partnerships. We address each of these contentions in turn.

We are not persuaded that the nonsettling defendants are foreclosed from bringing their cross-claims against Muss. They argue that the stipulations of settlement (the Settlement Agreements) purport to extinguish "any and all claims for relief, demands, rights, actions, and causes of action (whether . . . derivative or individual in nature), . . . that have been, could have been, or in the future might be asserted . . . by any or all of the Non-Settling Defendants against arising out of . . . this] transaction." While the final orders issued by the district court state that the court approves of the settlement agreements in their entirety, the district court made clear during oral argument that these agreements were not binding on the nonsettling defendants. Judge Martin stated to the nonsettling defendants: "The stipulation is not binding on you. You are not a party to it."

The nonsettling defendants make much of the assertion they claim Muss made in his letter brief submitted to this Court that the Settlement Agreements resolved their two pending crossclaims against him. Their reliance on this statement is misplaced. The district court has already stated that the Settlement Agreements are not binding on the nonsettling defendants and to the extent that Muss said anything to the contrary it is irrelevant. In fact, however, Muss' letter specifically states: "[I]f, indeed, the [nonsettling defendants] . . . ha[ve] valid 'direct' claims against Muss, the settlement does not even purport to extinguish such claims." His earlier statement relied on by the nonsettling defendants simply stated Muss' belief that the cross-claims were just disguised claims for contribution or indemnity and as such were barred by the settlements. Even as to these types of claims, as Muss pointed out,

the Settlement Agreements fully protect the nonsettling defendants.[3] Finally, we note that, during oral argument, counsel for the nonsettling defendants conceded that he did not believe that he was necessarily prevented from pursuing Muss.

We also are not persuaded that the orders of the district court extinguish property rights of the nonsettling defendants in the 79th Street Garage. At the time the Receiver was appointed, the 79th Street Limited Partnership had been in default for several months in rent payments on the 79th Street Garage leasehold interest and had failed to make other mandatory payments including taxes owed. There was a pending eviction proceeding to which it had raised no defense. Indeed, appellant Mark Fogel testified that the garage was operating at a monthly loss and that the partnership did not have the funds to cure the default.

The nonsettling defendants were provided with notice and a hearing on the fairness of both Settlement Agreements prior to the district court's approval of them. At the hearing, in addition to arguing that the Settlement Agreements purported to foreclose their right to bring claims against Muss, the nonsettling defendants also argued that it was not permissible for their property rights in the 79th Street Garage to be extinguished by agreement of other parties. The judge noted that there was no defense to the state eviction action other than a possible cross-claim in this proceeding. In response to the nonsettling defendants' contention that it was possible that the financial status of the leasehold on the 79th Street Garage had since improved, the judge inquired of the Receiver for a report. The Receiver stated that the 79th Street Garage was not a viable entity given the amount of rent the limited partnership was obligated to pay. He also stated that the partnership was not giving up anything of value in returning the leasehold interest to Muss.

Therefore, under the lease entered into by Muss as Landlord and the 79th Street Limited Partnership as Tenant for the 79th Street Garage, the nonsettling defendants had already forfeited their property interest in the garage. The lease provides that if the partnership defaulted in its rent or tax payments it would lose its rights to the leasehold interest. It states, in pertinent part, in paragraph 17 entitled "Default:"

> [If] Tenant shall make default in the payment of the rent . . . or in making any other payment herein required; then . . . Landlord may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise . . . and hold the premises as if this lease had not been made and Tenant hereby waives the service of notice of intention to reenter or to institute legal proceedings to that end.

Absent the stay by the district court of the state foreclosure proceeding, it is clear that the 79th Street leasehold would have been returned imminently to Muss, the fee owner. In fact, the leasehold on the Thompson Street Garage had already been returned to the fee owner of that property. The district court denied Muss' motion to vacate the stay of the state court action because, among other reasons, the damages the plaintiffs sought from Muss far exceeded the unpaid rentals.

The court thus implied that the eviction action should be stayed and the Receiver should retain possession of the 79th Street Garage as a potential setoff against the claims by the limited partners against Muss. The nonsettling defendants cannot now be heard to complain that the orders in question extinguished their

rights in the 79th Street Garage; the record makes clear that they had no rights remaining to extinguish.

Finally, we are not convinced that the orders at issue deprive the nonsettling defendants of the repayment of certain loans they claim they made to the partnerships. The nonsettling defendants argue they are entitled to a return of these loans prior to distribution to the limited partners. They contend that the limited partners should not be allowed to give up the 79th Street Garage because the partnership agreements give priority to repayment of any loans made by the nonsettling defendants to the partnerships.[4] The appellees point out that this argument was not raised either in the pleadings or during the hearing before Judge Martin on the fairness of the settlement.

Even presuming the loans the nonsettling defendants now allege they made were valid, the return of the 79th Street Garage to Muss does not affect the ability of the 79th Street Limited Partnership to repay them. The court-appointed Receiver has stated that the 79th Street Garage has no value to the partnership. Therefore, returning the leasehold to Muss does not deprive the partnership of any asset that could be used to repay any debts. Because we have already decided that the nonsettling defendants have no remaining rights left in this property, their claim that they have standing to appeal the final orders because they now allege the partnerships owe them money is without merit.

CONCLUSION

The two final orders of the district court at issue in these appeals do not affect the rights of the nonsettling defendants. We therefore dismiss both appeals for lack of standing.

Appendix B

FOOTNOTES

1. Defendants Mark H. Fogel, Judith Reaume, Frederick M. Mintz and JEM Management Associates Corp. are appellants in both the *Zupnick* and the *Sperber Adams* appeals. In addition, defendant Mintz & Fraade, P.C. appeals the final order in *Zupnick* and defendant JEM Parking Management Corp. appeals the final order in *Sperber Adams*.

2. In June 1992, the district court, for the sake of efficiency and with the approval of counsel for the *Sperber Adams* plaintiffs, dismissed all claims in *Sperber Adams* related to the Thompson offering as duplicative of the claims raised in *Zupnick*. *Sperber Adams Assocs. v. JEM Management Assocs. Corp.*, No. 90 Civ. 7405, 1992 WL 138344 at *1 (S.D.N.Y. June 4, 1992). The *Sperber Adams* plaintiffs are in the process of seeking to have a class certified for all limited partners of the 79th Street Limited Partnership as against the remaining defendants. For purposes of the settlement with Muss, the district court has certified as a class the purchasers of units of limited partnership interests in the 79th Street Limited Partnership, except defendants, members of their immediate families, their heirs, successors or assigns, and any affiliate of any defendant.

3. The Settlement Agreements provide that "Plaintiffs and the Class agree to reduce or satisfy any judgment obtained either by settlement or after trial against Non-Settling Defendants, or any of them, to the extent necessary to extinguish any claims of such Non-Settling Defendants for indemnity or contribution from Muss, as may be determined by the Court or jury."

4. The nonsettling defendants raise this argument in their reply briefs in both *Zupnick* and *Sperber Adams* apparently

claiming they made loans to both the Thompson and the 79th Street Limited Partnerships. In both briefs they argue that the existence of these loans prevents the return of the 79th Street Garage to Muss. We fail to understand how loans made to the Thompson Street Limited Partnership could prevent the return of the 79th Street Garage. Therefore, we address this argument only as it applies to the 79th Street Limited Partnership.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK FILED JULY 9, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6607 (JSM)

ALEX ZUPNICK, HERBERT H. LEVESS and ALLEN KOPELSON,Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

-against-

JEM MANAGEMENT ASSOCIATES CORP.; MARK H. FOGEL; JUDITH REAUME; FREDERICK M. MINTZ; MINTZ & FRAADE, P.C.; STANLEY MUSS; JACK FOGEL; B.S.D. PARKING CONSULTANTS, INC.; and MARTIN PREW,

Defendants.

FINAL ORDER

This matter having come before this Court on the application of the parties to a Settlement Agreement dated April 16, 1992 (the "Agreement"), for approval of the settlement of the above-captioned action (the "Action") as between the parties to the Agreement, and this Court having considered the Agreement, the terms of which are expressly incorporated herein by reference, all other submissions and motions filed, and arguments made by counsel in connection therewith, and the pleadings, files and

records and proceedings in this Action, and a hearing having been held before this Court on June 26, 1992, after due notice by first class mail to all members of the Settlement Class (hereinafter referred to as the "Class") at which hearing all Class members were given an opportunity to be heard, and at which time this Court approved the Agreement, the settlement set forth therein, and all of the transactions contemplated thereby, as fair, just, reasonable, adequate and in the best interests of the Class, and this Court otherwise being fully advised and informed, this Court finds as follows:

A. After good faith, arms-length negotiations, the representative plaintiffs and Stanley Muss (the "Settling Defendant"), who are parties to the Agreement, through their respective counsel, executed and filed the Agreement, setting forth the terms and conditions of a settlement agreement by and between the parties thereto. The Agreement provides for the settlement of the Action on behalf of the named plaintiffs and the members of the Class, on the one hand, and the Settling Defendant, on the other. The Agreement shall not take effect without the satisfaction or waiver of certain conditions set forth in Paragraph 10 of the Agreement, and the entry and finality of this Final Order (the "Final Order").

B. In this Court's Order Regarding Notice of Proposed Partial Settlement to the Class and Hearing on Proposed Settlement, dated April 16, 1992, (the "Notice Order"), this Court approved the forms of Notice of the proposed settlement and of the Hearing and Proof of Claim and Release, and ordered that the Notice and Proof of Claim and Release be mailed in accordance with that Order. Pursuant to the Notice Order, on April 28, 1992, counsel for plaintiffs caused the Notice to be so mailed. Proof of said mailing has been filed with the Court.

Appendix C

C. The Notice provided to the members of the Class was the best possible notice practicable under the circumstances and included individual notice to all Class members who could be identified upon reasonable effort. The certification of mailing filed with this Court demonstrates that this Court's Notice Order with respect to the Notice and Proof of Claim and Release was complied with and that the best notice practicable under the circumstances was in fact given. Such notice constitutes valid, due and sufficient notice to all Class members and complies fully with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure.

D. The Settling Parties jointly have applied to this Court for approval of the terms of the Agreement and for the entry of this Final Order. Pursuant to the Notice to all members of the Class, a hearing was held before this Court on June 26, 1992, to consider whether the Agreement, the settlement set forth therein and the transactions contemplated thereby, should be approved as fair, just, reasonable, adequate, and in the best interests of the Class.

E. Counsel for plaintiffs have also applied to this Court for an award of attorneys' fees and expenses to be paid out of the settlement fund. Pursuant to the Notice to all members of the Class, a hearing was held before this Court on June 26, 1992, to consider whether the amounts sought by Counsel for such fees and expenses are fair and reasonable and, whether in view of all the circumstances, such fees and expenses should be paid out of the proceeds of the settlement.

THIS COURT, THEREFORE, GOOD CAUSE APPEARING, HEREBY ORDERS, ADJUDGES AND DECREES THAT:

Appendix C

1. The terms used in this Final Order shall have the same meanings as those terms have in the Agreement, except as otherwise specified herein.

2. The Court has jurisdiction over the subject matter of this action and over the Plaintiff, the Class and all members of the Class and the Settling Defendant.

3. This Court hereby approves in its entirety the Agreement, the Settlement set forth therein and the transactions contemplated thereby, and finds and concludes that the Agreement, the Settlement and the transactions contemplated thereby, are in all respects fair, just, reasonable, adequate and in the best interests of the Class, and each of the members of the Class, and this Court therefore directs the Plaintiffs, the Class and the Settling Defendant to comply with the terms of the Agreement and the Settlement set forth therein and to carry out the transactions contemplated thereby.

4. The Court further finds that the Agreement, the Settlement set forth therein and the transactions contemplated thereby are the product of good faith, arm's-length negotiations between the parties to the Agreement.

5. The release of claims and covenant not to sue by plaintiffs and other members of the Class as set forth in the Agreement, are hereby rendered and declared fully effective and enforceable, and the Settling Defendant is hereby fully and forever released and discharged with respect to any and all of the released claims.

6. Any judgment obtained by plaintiffs and the Class, either by settlement or after trial, against Non-Settling Defendants, or any of them, shall be reduced or satisfied to the extent necessary to

extinguish any claims of such Non-Settling Defendants for indemnity or contribution from the Settling Defendant, as may be determined by the Court or jury.

7. The Agreement, any exhibit or document referenced therein, the settlement contained therein, this Final Order, any action, proceeding or order relating to the Agreement or the settlement set forth herein, and any action taken to effectuate or further the Agreement, the settlement set forth therein, or this Final Order: (a) shall not be construed as, and shall not be used as an admission by or against the Settling Defendant, other person or entity (including members of the Class) as to any matter whatever, except with respect to a claim of breach of the Agreement or failure to carry out any obligation thereunder or in connection therewith; (b) shall not be deemed to be and shall not be used as any admission of any fault, wrongdoing, liability or omission whatsoever, whether or not in any statement, release, or written document or report issued, filed, or made, except with respect to a claim of breach of the Agreement or failure to carry out any obligation thereunder or in connection therewith; (c) shall not be deemed to be and shall not be used as a waiver or limitation of any defenses otherwise available to the Settling Defendant; (d) shall not be referred to, or offered, used or received in evidence, or otherwise used in a manner inconsistent with Section 6 of the Agreement. The Settling Defendant has denied, and continues to deny, that he has any liability arising out of any of the allegations made in any pleading or proceeding in the Action.

8. Unless the Agreement and the settlement provided for therein are terminated pursuant to its terms, or for any other reason ceases to become or ceases to remain effective, the Settling Defendant and the members of the Class are ordered and affirmatively enjoined to comply with all of the terms and provisions of the Agreement and this Final Order, and to undertake

all acts and perform all obligations imposed under the Agreement and this Final Order as reasonably necessary to effectuate all of the terms contained herein or therein.

9. Without affecting the finality of this Final Order in any way, this Court hereby retains continuing jurisdiction over the Action, all of the members of the Class, the Settling Defendant, and over any and all matters relating to the administration and consummation of the Agreement, the settlement provided for therein and the transactions contemplated thereby.

10. In the event that for any reason this Final Order ceases to remain in effect or the Settlement otherwise does not become effective or remain effective in accordance with the terms of the Agreement or for any other reason, including without limitation, because of the nonfulfillment, or impossibility of fulfillment, of any of the conditions of the Agreement:

> (a) This Final Order shall be rendered null and void and shall be vacated *nunc pro tunc*;
>
> (b) The Agreement and the settlement reflected in the Agreement shall be terminated pursuant to the terms of the Agreement and the parties to the Agreement shall be deemed to have reverted to their respective status and position in the Action as of the date immediately prior to the execution of the Agreement, except for the provisions of Sections 21 and 22 of the Agreement.

11. The Action, including all claims against the Settling Defendant and all persons acting on his behalf, including his heirs,

assigns, successors, executors, administrators , agents, attorneys and representatives (excepting the Non–Settling Defendant) which have been, or could have been, asserted in the Action or arising out of any of the transactions, occurrences, disclosures, facts, operations, purchases or sales that are the subject of the Action (other than faithful compliance with the terms of the Agreement), is dismissed with prejudice and without costs as against the Settling Defendant.

12. The entry of this Final Order shall constitute a release by the Class and each member thereof of any and all claims from the beginning of time to the date of entry of this Final Order, presently known or unknown, direct or derivative, asserted or that could have been asserted, or that may hereafter be asserted in relation to the transactions, occurrences, disclosures, facts, operations, purchases or sales alleged in, or that could have been alleged in, the Action including the First Amended Complaint (except for compliance with the terms of the Agreement), against the Settling Defendant and all persons acting on his behalf including without limitation his predecessors, successors, subsidiaries, affiliates and agents (excepting the non-Settling Defendants). The entry of this Final Order shall also constitute the granting by all members of the Class of a covenant not to sue the Settling Defendant and all persons acting on his behalf including without limitation his heirs, assigns, successors, executors, administrators, agents, attorneys and representatives (excepting the Non-Settling Defendants).

13. Persons who have duly and timely requested exclusion from the Class and not duly and timely canceled such, as against the Settling Defendant, may now pursue only their own individual claims and remedies, if any, at their own cost and expense, and may not pursue derivative claims and remedies on behalf of Thompson Parking Partners, Limited Partnership III. All other members of the

Class shall be bound by all of the applicable terms and provisions of this Final Order and of the Agreement.

15. The Court hereby approves an award of attorneys fees and disbursements to plaintiffs' counsel and directs that the following amounts shall be paid out of the proceeds of the settlement fund:

A. The amount of $100,000.00 to the firm of Laventhall & Zicklin for its fee;

B. The amount of $60,000.00 to the firm of Laventhall & Zicklin for reimbursement of expenses;

C. The amount of $2,156.00 to the firm of Bodian & Eames for its fee.

14. There being no just reason to delay the entry of this Final Order, this Court hereby directs entry of this Final Order as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: New York, New York
July 1, 1992

s / J. S. Martin
U.S.D.J.

APPENDIX D — NOTICE OF APPEAL DATED AUGUST 10, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6607 (JSM)

ALEX ZUPNICK, HERBERT H. LEVESS and ALLEN KOPELSON,Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

-against-

JEM MANAGEMENT ASSOCIATES CORP.; MARK H. FOGEL; JUDITH REAUME; FREDERICK M. MINTZ; MINTZ & FRAADE, P.C.; STANLEY MUSS; JACK FOGEL; B.S.D. PARKING CONSULTANTS, INC.; and MARTIN PREW,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that defendants JEM Management Associates Corp., Mark H. Fogel, Judith Reaume, Frederick M. Mintz, and Mintz & Fraade, P.C., hereby appeal to the United States Court of Appeals for the Second Circuit from the order approving the Settlement Agreement between plaintiffs and Stanley Muss entered in this action on the 9th day of July, 1992.

Dated: New York, New York
August 10, 1992

Appendix D

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